No. 83-261

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, AND THE CITY OF ALLENTOWN,
*Petitioners*

*v.*

ROGER SAMES AND DENNIS TROCCOLA,
*Respondents*

# REPLY BRIEF FOR PETITIONER

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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## REPLY BRIEF FOR PETITIONERS

The brief submitted in opposition to the petition for writ of certiorari attempts to dissuade this Honorable Court from reversing an obvious maneuver to evade the clear implications of respondents' failure to comply with the plain terms of explicit procedural rules governing the litigation which respondents commenced. The misstatements contained in and the facts omitted from respondents' brief compel the submission of this response for petitioners.

Respondents' denouncement of the application of those rules and their mischaracterization of the situation as one in which they stood only as innocent victims of the petitioners' machinations call to mind the procedural tenor struck by respondents in the initial stages of this litigation. Although obviously ignored by respondents, the record in this case reveals that respondents sought initially to deprive petitioners of any opportunity to contest the strength of respondents' allegations. When petitioners' district court counsel was first notified of respondents' complaint, he telephoned respondents' counsel and requested an extension of time to act on petitioners' behalf. The request was made because petitioners' counsel of choice had not yet been furnished with respondents' complaint and because his notification was received only during the Easter solemn days. Respondents' attorney flatly refused the request for extension of time, and then watched the district court's dockets like a vulture until 3:00 o'clock of the afternoon of the day set by the rules for respondents' initial pleading. In spite of his knowledge that petitioners' district court counsel timely filed a motion to dismiss the complaint, and a petition for enlargement of time to act (docket entries), respondents' counsel then requested the clerk to enter a default and later filed a motion for entry of default (*Id.*). Respondents' motion contended that petitioners' motion should be disregarded because it was not accompanied by a brief allegedly required by Local Rule 20(c), and because the motion was not

postmarked until April 12, 1982. Petitioners' motion recited the grounds and certain authorities and was accompanied by a memorandum of law that was fully supplemented before respondents' filed their motion for default. Petitioners' motion was also accompanied by a proof of service stating that it was mailed timely before it was postmarked. The district court ultimately denied respondents' motion. Respondents never questioned this ruling in the district court or elsewhere, although they have later sought to invoke procedural rules to prolong the litigation and denounce the implementation of procedural rules as unfair.

Respondents would have this Honorable Court believe that the district court acted precipitously and improperly in ultimately granting petitioners' motions to dismiss and for summary judgment, and that the court of appeals believed "that the lower court's actions were, at best, improvident" (Brief in Opposition To Petitioners' Petition for Certiorari, p. 2). The court of appeals did not express any such belief in its opinion and refrained explicitly from ruling on the merits of respondents' appeal. Upon complete consideration of the record and applicable case law, one cannot reasonably contest the district court's action. On the one hand, respondents predicated their property right to their sergeant stripes upon a state law that has no application to them, as correctly found by the district court. On the other hand, apart from the controlling point that respondents' demotions were not procedurally unlawful, the record clearly establishes that the district court did not act precipitously.

Respondents assert that the district court's final order and judgment were entered "*without* prior notice, *without* an opportunity for hearing or oral argument, *before* opposing affidavits could be filed, *before court-ordered* discovery was provided (to wit, *Petitioners'* Answers to Respondents' Interrogatories), and *before* more than one half of the depositions previously taken by Respondents *had ever been filed* (and thus available to the court for consideration)" (Brief In Opposition To Peti-

tioners' Petition For Certiorari, p. 4) (Emphasis in original). Respondents fail to acknowledge to this Honorable Court that they knew of petitioners' motion for summary judgment because they responded to its merits and to the merits of petitioners' outstanding and supplemented motion to dismiss (Docket Entries 15 & 16). Respondents also fail to disclose that, before it ruled on the petitioners' motions, the district court sent a letter to respondents' counsel advising him of the filing of the summary judgment motion and the need for a response from his clients. As noted by the district court (Petition For Writ Of Certiorari, p. A-16), "[t]he notice provisions of Fed. R.Civ. P. 56 were more than adequately met in that [respondents] had 'prior knowledge that the court was considering . . . summary judgment'. *Bryson v. Braud Insulations, Inc.*, 621 F.2d 556, 559 (3 Cir. 1980)". The other assertions by respondents are equally disingenuous.

Subsection (f) of Local Rule 20, which respondents had previously cited in their attempt to avoid contest of their claims by default, explicitly advises that the parties have no vested right to oral argument. Respondents acknowledged in their motion for reconsideration that hearing or oral argument was a "priviledge" [sic] (Appendix For Appellants, p. 302, ¶2), and the district court correctly observed that "whether oral argument on any particular motion is warranted is committed to the Court's sound discretion" (Petition For Writ Of Certiorari, p. A-16).

Respondents' lament that the district court acted "*before* opposing affidavits could be filed" is belied by their statement in their motion for reconsideration "that Plaintiffs, by copy of affidavits 'A' through 'E' attached hereto, were at all times capable of demonstrating the basis for said claim" (Appendix For Appellants, p. 303, ¶4). Respondents instead chose to rely on the allegations of their complaint. As correctly noted by the district court (Petition For Writ Of Certiorari, pp. A-14 and A-15), established law ruled out the efficacy of both respondents' pleading reliance and the belatedly withheld

affidavits. In addition, respondents have never proffered a reason why they were "prevented" from submitting with their response to petitioners' motion that evidence which they were admittedly "at all times capable of demonstrating".

Respondents' assertion that the district court acted precipitously "before court-ordered discovery was provided (to wit, Petitioners' Answers to Respondents' Interrogatories)" is misleading in two fundamental respects. First, at no time did respondents request that the district court order and at no time did the district court order petitioners to answer respondents' interrogatories. The district court's docket entries reveal that the only motion for sanctions filed by respondents was denied (Entry no. 30), and that the only order referring to answers to interrogatories was that which was directed to respondents (Entry no. 33). Second, those interrogatories were directed to and addressed the issues presented to the very same persons whose depositions respondents had already taken. Respondents have never suggested that their claims would be established by petitioners' answers to interrogatories when those interrogated by deposition refuted those claims. Any implication by respondents that their case depended upon petitioners' answers to interrogatories vanishes in light of respondents' declaration to the district court that "Plaintiffs' discovery prior to Defendant's [sic] Motion for Summary Judgment was in its infancy and had consisted solely of the testimony of adverse deponents upon whom plaintiffs' [sic] never intended to rely to establish 'specific facts' concerning the issue of 'politically motivated firing' " (Appendix For Appellants, p. 303, ¶4).

Respondents' final claim of injustice by reference to depositions is refuted not only by their reconsideration admission that "Plaintiffs believe that [the district court] was unaware that Plaintiffs' discovery was in its infancy and had consisted only of the testimony of adverse deponents upon whom Plaintiffs' [sic] never intended to rely to establish 'specific facts' concerning the issue of 'politi-

cally motivated firing' " (Appendix For Appellants, p. 303, ¶4), but by their simultaneous reference to affidavits which respondents "were at all times capable of demonstrating" (*Id.*), and by reference to the record presented to the court of appeals. That record indicated that the depositions presented and referred to by respondents to the court of appeals were not taken by respondents and were taken after the district court had ruled on the merits of petitioners' motions ( Appendix For Appellants, pp. 318, 398). Moreover, that record and the district court's docket entries also establish that the depositions in question were taken several weeks after respondents filed their motion for reconsideration. Any suggestion that petitioners' district court counsel duped respondents into an agreement to take depositions while trapping respondents by a motion for summary judgment is not only denied by petitioners' district court counsel but also belied by the record in this case.

Respondents' cavalier and misleading treatment of the development of this case before the district court also taints their assertions regarding the post-judgment events pertinent to the issue before this Honorable Court. Respondents strive to lay blame upon the district court and upon petitioners for the nullification of their appeal. Neither petitioners nor the district court urged or in any way induced respondents to make their F.R.A.P. 4(b)(4) motion or to file a notice of appeal before that motion was withdrawn or decided. What placed respondents in the "predicament" in which they should remain — to be satisfied with a final judgment that is proper upon the district court's record — is their own unprompted action in filing a F.R.A.P. 4(a)(4) motion and a notice of appeal before the district court acted on that motion. Simple reference by respondents' learned counsel to F.R.A.P 4(a)(4) and to the authorities controlling the nature of their motion, *e.g.*, *Hattersley v. Bollt*, 512 F.2d 209, n.17 at 215 (3 Cir. 1975); *Richerson v. Jones*, 572 F.2d 89, 93 (3 Cir. 1978); *Sonneblick-Goldman Corp. v. Norwalk*, 420 F.2d 858, 859 (3 Cir.

1970); *Gainey v. Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716, 718 (3 Cir. 1962); *see also, Griggs v. Provident Consumer Discount Co.*, 103 S.Ct. 400, 407 (Justice Marshall, dissenting), and *United States v. Dieler*, 429 U.S. 6, 97 S.Ct. 18, 50 (L.Ed. 2d 8 (1976), would have alerted respondents that their post-judgment motion fell within the scope of F.R.A.P. 4(a)(4). Respondents' offer that their notice of appeal was filed because their post-judgment motion "did not act as a supersedeas" (Brief In Opposition To Petitioners' Petition For Certiorari, p. 4) and their argument to the court of appeals that their motion was not encompassed by F.R.A.P. 4(a)(4), constitute as ineffective an excuse to recreate appellate jurisdiction to vacate the district court's final order and judgment as did respondents' original notice of appeal. Without the slightest justification for tactical moves admittedly unprovoked by either petitioners or the district court, respondents devote the balance of their brief in opposition to distractions which should not deter this Honorable Court from accomplishing that practical and swift grant of certiorari and reversal for affirmance of the district court's judgment as was accomplished in *Griggs v. Provident Consumer Discount Co.*, 103 S.Ct. 400, 74 L.Ed. 225 (1982), on remand, 699 F.2d 642 (3 Cir. 1983).

Respondents note that "[a]t the heart of this matter is the Court of Appeals' reference to Fed. R. Civ. P. 60(b)" (Brief In Opposition To Petitioners' Petition For Certiorari, p. 9), and immediately refer to Professor Moore's treatise for their proposition that, notwithstanding the strictures placed upon the courts to extend the time for appeal, a court of appeal may *sua sponte* invite a derelict appellant to regenerate appellate jurisdiction by moving the district court to vacate and reinstate a judgment which the district court validly entered and reconsidered as valid. Respondents' reference to "generally, 7 Moore's Federal Practice ¶60.27(2)" (*Id.*) cannot be found in the current edition of that work. The statements attributed to Volume 9 of the treatise are incom-

plete, because the treatise makes it clear that "it would be nonsense to hold that the intention was to limit the power of the court to extend the time for appeal on ground of excusable neglect to 30 days under [F.R.A.P. 4], and permit extension on the same ground within a year under [F.R.A.P. 60(b)]." *Moore's Federal Practice*, ¶204.13[5], p. 4-110, and that "Absent these special circumstances, it appears abundantly clear from both the text and history of Rule 4(a)(5) that it serves as a mandatory limit on the power of the district court to excuse the failure to file a timely notice of appeal on the ground of excusable neglect, whether such neglect is based on failure to learn of the judgment or otherwise", *Id.*, p. 4-112.

Respondents then cite a string of cases for the proposition that "as long as circumventing the impact of Fed. R. Civ. P. 77(d) is not the sole reason for seeking relief pursuant to Fed. R. Civ. P. 60(b), Rule 60(b) may be used to avoid the restrictive measure of Fed. R. App. P. 4(a) upon a showing of compelling, exceptional or extraordinary circumstances" (Brief In Opposition To Petitioners' Petition For Certiorari, pp. 9-10). One may ignore this statement and the remainder of respondents' brief, all of which subsume that the court of appeals in fact found such circumstances, because the court of appeals explicitly stated that it "will not consider whether this case involves 'unique circumstances' such as those recognized by the Supreme Court in Thompson vs. INS, 375 U.S. 384 (1964) (per curiam)" (Petition For Writ of Certiorari, p. A-6, n.3). A review of the cases cited by respondents reveals not only that none of them considered or implemented *Griggs* (which they all preceded), but also that they offer no support for the action taken by the court of appeals to extend indirectly the time for review of the district court's judgment and order:

— *Klapport* involved a default judgment effected by the government in a deportation case against an impoverished defendant who could not afford counsel and who was prevented by the govern-

ment seizure of his draft answer and request for pro bono assistance and by his incarceration by the government from taking appropriate action.

— *Hensley* found no compelling circumstances to side-step F.R.A.P. 4(a) even though the district court had entered an order noting that appellant intended to appeal if its new trial motion were denied.

— *Fidelity & Deposit Co.* involved F.R.C.P. 77, which is not at issue here, and afforded relief to an appellant who took prompt action to rectify a situation created by a district court's express assurance that its continued efforts to perfect a timely appeal could cease.

— *International Controls Corp.* afforded the appellant no relief.

— *Braden* dealt with a certification order not controlled by Rule 4(a).

— *Kramer* found no compelling circumstances.

— *Scola* dealt with an amended judgment from which the appeal was taken to reinstate the original judgment, and the quotation offered by respondents (Brief In Opposition To Petitioners' Petition For Writ Of Certiorari, p. 10) is dictum, the court having prefaced its remarks with the statement that, "It is not necessary, then, to deal with defendants' other arguments", 618 F.2d at 151.

— *Smith* found unique circumstances incomparable to those advanced here by respondents.

— *Vasquez* involved F.R.C.P. 77 and false assurances by the district court that final judgment was not entered.

None of these cases provide the slightest assistance to respondents. Respondents unquestionably knew of peti-

tioners' motion for summary judgment. Respondents should have anticipated that the district court would rule on the motion, if only because respondents had contested it on the merits. Respondents did not insist upon oral argument, and their admissions in the district court bear witness to their anticipation that oral argument would not be granted. Respondents knew of the district court's actions, and were free and able to take further action through counsel who professed astuteness in procedural rules. Respondents were in no way foreclosed wrongfully from disclosing the existence of facts in support of their claims, and their belated disclosure of evidence admittedly available to them "at all time material" was patently insufficient. Respondents took a highly inimical stance towards petitioners, attempting to draw them into default, opposing their motions, giving no procedural quarter or credence, and ultimately asserting that their proofs did not lie with respondents. Respondents could not seriously be heard to have relied reasonably upon anything said or done by petitioners, and their circumstances fail to condone any evasion of the dismissal without relief contemplated and effected in *Griggs, supra.*

Respondents finally grasp at the district court's reconsideration order and the court of appeals' opinion and divine from them an implied ruling from the district court that respondents could ignore F.R.A.P. 4(a) and obtain effective appellate relief, and an implied ruling from the court of appeals that respondents' case presented unique and extraordinary circumstances compelling the court of appeals hold that respondents may be entitled to Rule 60(b) relief. The rulings divined by respondents cannot reasonably be found in the lower courts' rulings.

The district court's discussion of "lack of jurisdiction", like that made by petitioners in opposition to respondents' post-judgment motion, merely indicated, as revealed by the citations to *Securities & Exchange Commission v. Investors Security Corp.*, 560 F.2d 561, 568 (3 Cir. 1977), that the district court should not act dur-

ing the pendency of an appeal. No comment was made that this forebearance confirmed the validity of the appeal. The court of appeals obviously did not so regard the situation as now depicted by respondents. The court of appeals made reference to the district court's post-judgment ruling, but did not characterize it or comment at all upon its intent or implications. The court of appeals did not in any way elucidate the "circumstances" or the precedents which prompted it to acknowledge but sidestep *Griggs*. That which respondents see in the district court's September 25 order, in petitioners' memorandum and in the court of appeals' opinion does not exist in plain print.

The petition for writ of certiorari should be granted and the contested portion of the court of appeals' judgment should be vacated.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

By: _____

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